SYKT. MULTI WOOD

v.

FOOSAN TIMBER INDUSTRIES SDN. BHD. & ANOR.

HIGH COURT BORNEO, KUCHING
CHONG SIEW FAI J
[SUIT NO. KG. 105 OF 1983]
7 JULY 1992

CIVIL PROCEDURE: *Application for consolidation of actions - Cross-actions - Plaintiff in one action is defendant in another - Whether cross actions can be consolidated - Relief refused.*

The plaintiff applied that action No. 1 (S/KG. 105/83) and action No. 2 (S/MR. 25/1983) be consolidated and proceeded as one action. The defendants opposed the application.

The plaintiff in the two actions are represented by different advocate-firms and the defendants in the two actions were also represented by different advocate-firms. However, plaintiff in action No. 1 and the defendant in action No. 2 are represented by the same advocate-firm.

It was also confirmed that the plaintiff in action No. 1 and the firm described as the defendants in action No. 2 were one and the same. The issue was whether the action were cross-actions and if so whether they can be consolidated.

Held:

[1] The actions were cross-actions in the sense that the plaintiff - firm in one action (action No. 1) was also the defendant in the other action (action No. 2).

[2] The cross-actions cannot be consolidated. In a consolidated action, the plaintiffs are in the same condition as co-plaintiff because the plaintiff in one action is the defendant in another. The same person cannot be both a plaintiff and a defendant.

[3] The application ought not to be granted.

[Application was dismissed with costs.]

Cases referred to:
Ellis v. Kerr [1910] Ch 529 ***(cit)***
Lewis v. Daily Telegraph (No. 2) [1964] 2 QB 601 ***(cit)***

For the plaintiff (Suit KG. 105/83) - T.M. Ting; M/s. Ting & Co.
For the plaintiff (Suit MR. 25/83) - Fabian Lim; M/s. Chua, Khaider, Lim & Co.
For the defendants - George Lo; M/s. Nashir, Johal & Lo

JUDGMENT

Chong Siew Fai J:

This is an application by the plaintiff, Syarikat Multi Wood, that this action S/KG.105/83 (action No. 1) and another action S/MR.25/1983 (action No. 2) be consolidated and proceeded as one action.

The defendants oppose the application.

In this action the plaintiff Syarikat Multi Wood (a firm) is represented by Messrs. Ting & Co. and the defendants are Foosan Timber Industries Sdn. Bhd. and Huang Ee Hoe, both represented by Messrs. Nashir Johal & Co.

In action No. 2, the plaintiff is Foosan Timber Industries Sdn. Bhd. represented by Messrs Chua, Khaider, Lim & Co. and the defendant is "New Chew trading as Multi Wood Contractor (a firm)" represented by Messrs. Ting & Co.

Thus, it is clear from the above that:

(1) the plaintiffs in the 2 actions are represented by different firms of advocates;

(2) the defendants in the 2 actions are also represented by different firms of advocates; and

(3) the plaintiff in action No. 1 and the defendant in action No. 2, however, are represented by the same advocate-firm.

There is material which stands uncontradicted that the firm-name of "Multi-Wood Contractor" (defendant) in the title of action No. 2 is erroneous and should be "Syarikat Multi Wood" that is, the same firm as the plaintiff in action No. 1 (See para. 6 of New Chew's affidavit affirmed on 29 November 1991). At the hearing this morning Encik Fabian Lim of Counsel for the plaintiff in action No. 2 confirmed the above. In other words, it is the correct position as contended by the applicant that the plaintiff-firm in action No. 1 and the firm described as the defendant in action No. 2 are one and the same firm. This is also reiterated by the applicant when New Chew deposed that his firm Syarikat Multi Wood was a party in both the Miri Suit and the Kuching Suit. (See para. 4 of his affidavit affirmed on 18 February 1992). That being the case, the actions are cross-actions in the sense that the plaintiff-firm in one action (action No. 1) is the defendant in the other (action No. 2) though in the latter action a partner is sued trading as the firm.

Cross-actions, in my opinion, cannot be consolidated. In a consolidated action, the plaintiffs are in the same condition as co-plaintiffs. In the case of cross-actions this is impossible because the plaintiff in one action is the defendant in another. The same person cannot be both a plaintiff and a defendant in an action. *Ellis v. Kerr* [1910] ch. 529 @ 537.

In the instant case, since the plaintiffs in both actions are not only different but are also represented by different advocate-firms and there is no indication that they (the plaintiffs) would be represented by one advocate-firm (a situation which is virtually impossible since the 1st defendant in action No. 1 is the plaintiff in action No. 2), an order for consolidation will not be granted: (*Lewis v. Daily Telegraph* (No. 2) [1964] 1 QB 601.

Moreover, as it is not disputed that the plaintiff-firm in action No. 1 is the same firm described as the defendant-firm in action No. 2 and it is the case of the applicant that it was impracticable or impossible to counterclaim in action No. 2 which was an action commenced by Foosan Timber Industries Sdn. Bhd. only (see para. 7 of New Chew's affidavit affirmed on 18 February 1992), this is a further ground that the application should not be allowed.

Having heard submissions by learned Counsel and after considering the evidence and materials before me, I am of the view that the application ought not be granted for the reasons given above.

The application is dismissed with costs to the defendants.

For the defendants it has been suggested that action No. 1 be stayed pending the outcome of action No. 2. I prefer not to make any decision on the point in this application. The matter was not fully argued. I leave it to the defendants to apply for the relief if considered fit.

Also found at [1992] 4 CLJ 1915